FOO TYE ELECTRICAL ENGINEERING SDN BHD A

v.

SARAWAK ELECTRICITY SUPPLY CORPORATION

HIGH COURT SABAH & SARAWAK, SIBU B
LINTON ALBERT J
[SUIT NO: 22-25-2002]
13 FEBRUARY 2007

CONTRACT: *Breach - Variation of contract - Claim for work done - Laying of submarine cable - Cable washed away by river current - Whether loss to be borne by plaintiff - Whether entitled to be paid - Whether terms of contract varied by conduct of parties - Evidence Act 1950, s. 92(d)* C

D

By an agreement it executed with the defendant, the plaintiff undertook to lay a submarine cable across the Saribas river in Sarawak for the defendant. The plaintiff completed the works in June 1994 but, towards the end of January 1995, after jointing works thereon had been carried out by the defendant, the cable E was irretrievably washed away by the river current. The defendant contended that the plaintiff was negligent in failing to provide anchors to secure the cable and engage divers to ensure it was properly laid, and was in breach of cl. 19 of the contract for failing to issue a written notice in respect of the completion of the works F – and in the circumstances – refused to pay the sum of RM176,626.28 claimed by the plaintiff for the work done. The facts showed that the plaintiff had been the defendant's contractor for 15 years and had successfully carried out works under various contracts awarded by the defendant. The evidence G further showed that, in seven of these contracts, the defendant was handed over the completed works on the basis of verbal notices, and had made full payment to the plaintiff. This being the case, before the learned judge, questions arose as to whether the contract had been varied by the conduct of the parties, and if so, H whether the defendant could be said to have acquiesced in the absence of written notice herein.

I

Held (allowing the plaintiff's claim):

(1) The allegation that the plaintiff was negligent for failing to provide anchors and engage divers was not sustainable in the light of the incontrovertible evidence that the plaintiff was not required by the contract to either supply anchors or engage divers. (para 7)

(2) There was no merit in the argument that the submarine cable had not been handed over to the defendant. How else could the defendant possibly have carried out and completed the jointing works thereon if the same had not been handed over to the defendant. (para 6)

(3) The fact that the defendant had carried and completed jointing works on the submarine cable after the verbal notification of the completion of the works by the plaintiff, and that in respect of at least seven previous contracts the defendant had accepted verbal notices from the plaintiff, showed that the requirement of a written notice under the contract had been dispensed with. Clearly, that particular term in the contract had been varied. (para 6)

(4) The fact that the contract was stated to be on a turnkey basis is of no consequence because the submarine cable was supplied by the defendant, the location was decided by it and the works were supervised by defendant's representatives throughout. Likewise, the plaintiff has successfully established that the plaintiff's claim is not time-barred. The limitation period would only commence on 26 March 2002 when the defendant issued a letter to the plaintiff acknowledging the plaintiff's outstanding claim and since the suit was filed on 26 June 2002, it was well within the six years limitation period by virtue of s. 19(1) of the Sarawak Limitation Ordinance. (para 7)

[Plaintiff entitled to sum retained with interest thereon at 8% per annum from date of judgment until settlement.]

Case(s) referred to:

Paul Murugesu Ponnusamy v. Check Toh Gong & Ors [1996] 2 CLJ 397 SC ***(refd)***

Sri Kelangkota-rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92(d)
Rules of the High Court 1980, O. 18 rr. 7(1), 12
Sarawak Limitation Ordinance, s. 19(1)

For the plaintiff - Wee Wui Kiat; M/s Battenberg & Talma
For the defendant - Richard Poh; M/s Poh & Co

Reported by WA Sharif

JUDGMENT

Linton Albert J:

[1] The plaintiff's claim against the defendant is based on works carried out by the plaintiff for the defendant under three separate contracts. One of the contracts relates to the laying of a submarine cable by the plaintiff across the Saribas river. The submarine cable was supplied by the defendant. The plaintiff completed the works for the laying of the submarine cable in early June 1994 but towards the end of February 1995 the submarine cable was irretrievably washed away by the river current. The defendant retained and refused to pay out an aggregate sum of RM176,626.28 which the plaintiff claims to be entitled to for laying the submarine cable. The plaintiff contends that it is not responsible for the loss of the submarine cable but the defendant maintains that it is entitled to forfeit that sum and set it off against the loss of the submarine cable and the cost of laying a replacement submarine cable which constitute the defendant's counterclaim against the plaintiff.

[2] The defendant's defence and counterclaim revolve around the fact that the submarine cable laid by the plaintiff was never formally handed over to the defendant. Hence, the responsibility for the loss and replacement falls squarely on the plaintiff. The defendant relies on various provisions of the relevant contract to support its plea. Clause 19 states:

> When the works under this Contract is completed, the Contractor shall, after consulting the Corporation's Representative give him reasonable notice in writing of the date on and the place which the works/plants will be ready for inspecting/testing the installation as provided in the Contract with the Contractor.
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> ...

A Before commissioning, all electrical equipment/installation shall be subjected to the following site tests:

(a) Routine high voltage test

(b) Phasing test

B

(c) Insulation and continuity tests.

After the tests have been successfully carried out and the electrical equipment/installation energized the equipment/installation shall be taken over by the Corporation and the maintenance period shall C commence.

Clause 23 states:

The Contractor shall be required to carry out any adjustment and maintenance as deemed necessary by the Corporation's D Representative for a period of 6 months after the official taking over which shall be given in writing by the Corporation or the Corporation's Representative.

...

E **[3]** The defendant also relied on the following provisions of the relevant contract set out in the specifications:

Clause 2.1.2:

F ...

The Contractor is fully responsible for custody of the materials or tools and any item or items found damaged or lost shall be replaced by the Contractor at his own expense.

G Clause 6:

The Contractor shall be fully responsible for the safe custody of the Corporation's materials upon taking delivery until the formal completion of the Works. The Corporation's materials if found damaged or lost shall be replaced by the Contractor at his own H expense.

...

The defendant's denial of liability for its refusal to release the sum of RM176,626.28 is grounded on the following facts which are I either admitted or indisputable:

1. Contrary to cl. 19, the notice in writing was not given and the routine high voltage and the phasing tests were never carried out;

2. The completed submarine cable laying works were never commissioned nor taken over by the defendant in accordance with cl. 23.

[4] The defendant, therefore, contends that at the time the submarine cable was swept away and lost, the plaintiff was still responsible for its "safe custody" and the cost of replacing it under, cl. 6. The plaintiff, however, pleaded that the defendant "had acquiesced in the absence of written notices in the course of dealing between the plaintiff and the defendant and/or alternatively that the contract had been varied by the conduct of the parties."

[5] Learned counsel for the defendant, Mr. Richard Poh contended that the plaintiff was precluded from relying on the conduct of the parties and their previous dealings because these were not specifically pleaded and particularized. I find no merit in this proposition because O. 18 r. 7(1) Rules of the High Court 1980 states that the evidence by which those facts were to be proved need not be pleaded. The defendant could and should have asked for further and better particulars. This is provided for under O. 18 r. 12 Rules of the High Court 1980. The defendant did not do so and cannot now complain that it had been taken by surprise.

[6] The plaintiff has been the defendant's contractor for 15 years. It has in all these years successfully carried out works under various contracts awarded by the defendant. Evidence was adduced to establish that in seven of these contracts, as here, the defendant was handed over the completed works on the basis of verbal notices and full payment was made by the defendant in all those seven contracts. The plaintiff contends that it is therefore entitled to rely on the verbal notices given by the plaintiff to the defendant's representative.

Section 92(d) of the Evidence Act 1950 provides as follows:

> When the terms of any such contract etc. have been proved according to s. 91 reduced to the form of a document, no evidence of any oral agreement shall be admitted for the purpose of varying its terms: provided that: (d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract etc. may be proved except in cases in which the contract etc. is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

(See also *Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v. Check Toh Gong & Ors* [1996] 2 CLJ 397).

Clearly, the fact that the defendant carried out and completed jointing works on the submarine cable after the verbal notification of the completion of the works by the plaintiff in laying the submarine cable coupled with the fact that in respect of at least seven previous contracts the defendant had accepted verbal notices, the requirement of a written notice under the contract had been dispensed with. That particular term in the contract was thereby varied. It was contended for the defendant that even if a verbal notice was sufficient in these circumstances, the submarine cable laid by the plaintiff could not be said to have been handed over without the defendant having carried out and completed all the tests specified in the contract. The short answer to that argument which may sound dismissive is this: how else could the defendant possibly have carried out and completed the jointing works on the submarine cable if the same had not been handed over to the defendant. I need only refer to the judgment of Gopal Sri Ram, JCA in *Sri Kelangkota-rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779 to find support for the proposition that it would be unconscionable in the circumstances of this case to countenance the defendant's attempt to deny liability by resorting to the strict terms of the contract. His Lordship had this to say at pp. 803-805:

> Furthermore, the more recent cases indicate, in my judgment, that the application of *Ramsden v. Dyson* [1866] LR 1 HL 129) principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it

> would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.
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> ...
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> Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.
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> ...

[7] It was contended for the defendant that the plaintiff was negligent in carrying out the works relating to the laying of the submarine cable in that the plaintiff failed to provide anchors to secure the submarine cable and engage divers to ensure it was properly laid. This is not sustainable in the light of incontrovertible evidence that the plaintiff was not required either to supply anchors or engage divers. The fact that the contract was stated to be on a turnkey basis is of no consequence because the submarine cable was supplied by the defendant, the location was decided by it and the works were supervised by the defendant's representatives throughout, from the beginning until its completion 2 to 3 days after its commencement. I also find that the plaintiff has successfully established that this aspect of the plaintiff's claim is not statute-barred as alleged by the defendant because the correspondences between them clearly demonstrated the prolonged negotiations relating to the retention of the sum of RM176,626.28 culminating in the letter dated 26 March 2002 from the defendant to the plaintiffs' solicitors acknowledging the plaintiff's outstanding claim to that sum of money for the works relating to the submarine cable. By virtue of s. 19(1) of the Sarawak Limitation Ordinance, the limitation period would only commence from that date which was well within the six years limitation period because the suit was instituted on 26 June 2002. Section 19(1) states:

A If, before the expiration of the period prescribed for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

In the circumstances the plaintiff is entitled to the sum retained by the defendant. The defendant's counterclaim grounded as it was on the matters set out above is ill-conceived and unsustainable. Likewise, I find no merit in the plaintiff's claims under the 2 other contracts because no evidence was adduced as to how they arose under the 2 contracts and what they were made up of. Obviously, it is not sufficient for the plaintiff to produce invoices alleging that they relate to the two other contracts without first establishing the basis for those invoices. Simply put, the plaintiff's claims relating to the two other contracts were ill-founded and therefore not established.

[8] The reason aforesaid, plaintiff's claim for the sum of RM176,626.28 is allowed and judgment is accordingly entered for that sum against the defendant with interest thereon at 8% per annum from date of judgment until settlement, the defendant's counterclaim dismissed and costs to the plaintiff to be taxed unless agreed.